UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re Chapter 11 Bankruptcy,	04-17576
RIVERAIR, LLC.,	One Bowling Green New York, New York
Debtor.	February 3, 2005

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE STUART M. BERNSTEIN
CHIEF UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor:	DENNIS J. DREBSKY, ESQ. RICHARD J. BERNARD, ESQ. Nixon Peabody, LLP 437 Madison Avenue New York, New York 10022
For David Piedra:	JOSEPH T. MOLDOVAN, ESQ. MICHAEL R. DAL LAGO, ESQ. Morrison Cohen, LLP 909 Third Avenue New York, New York 10022
For Amsterdam 91st St.:	PAUL A. RUBIN, ESQ. Herrick, Feinstein, LLP 2 Park Avenue New York, New York 10016
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THE COURT: Riverair.

MR. MOLDOVAN: Joseph Moldovan, Morrison Cohen representing the movant, Sandor and Neustar. With me is David Dal Lago from my office and Michael Billotto.

THE COURT: We're a lot of lawyers for one motion. As long as the estate is not going I don't care.

MR. DREBSKY: Dennis Drebsky from Nixon Peabody. With me is my associate, Richard Bernard. We're here for the debtor.

THE COURT: Go ahead, Mr. Moldovan.

MR. MOLDOVAN: Your Honor was briefly informed about the nature of this as part of the first day motions that were filed before this Court.

THE COURT: And now I am well informed having reviewed all the papers.

MR. MOLDOVAN: And that is why I am going to be as brief as possible.

THE COURT: Let me ask you a question from the papers. It wasn't clear. What was involved in re-registering the ownership of the membership interest?

MR. MOLDOVAN: The re-registration is an interesting issue, Your Honor. This particular limited liability partnership agreement does not contain any provisions for re-registration. Consequently, there is no ability to re-register these shares, these interests.

THE COURT: But wouldn't Riverair's books and records reflect -- when I read it I assumed -- I assumed that it was simply a notation on Riverair's books and records that the membership interests were owned by whoever they were owned by.

MR. MOLDOVAN: That is one of the ways this could have been accomplished, Your Honor, but they simply did not do it.

THE COURT: I understand that. I just want to understand what was involved in this.

MR. MOLDOVAN: There is supposed to be annexed to the limited liability agreement, Your Honor, a list of the members.

THE COURT: Right.

MR. MOLDOVAN: There is no such list. In other words, the provisions of the -- those provisions which relate to re-registration are in essence irrelevant to this particular matter.

THE COURT: What evidence was there -- maybe I should ask Holdings this, but what evidence was there that Holdings owned a membership interest?

MR. MOLDOVAN: Holdings has said that they did. This was -- they've signed the various documents that were filed before this Court and other courts as the holder, as the owner of these membership interests.

THE COURT: I understand that, but --

MR. MOLDOVAN: I don't think there was any dispute in

this case that Holdings claims to be the sole member of Riverair, LLC.

THE COURT: I understand they claim that, but if you're saying there's no real written evidence that you own it, I'm just asking whether there's any evidence that Holdings owns it.

MR. MOLDOVAN: We signed the operating agreement. Let me see if --

THE COURT: That doesn't prove that they owned it. Morally if this were a corporation it would have a stock book. If they maintain the stock book it would indicate who the stockholders are.

MR. MOLDOVAN: That's correct.

THE COURT: There would be a partnership agreement and everybody would sign the partnership agreement.

MR. BERNARD: Your Honor, can I point through --

THE COURT: Sure.

MR. BERNARD: -- Exhibit B on our response which is the amended and restated operating agreement. In there it specifically says that Holdings is a sole member, that Neustar and Sandor are withdrawn as members and that Holding is the managing member. So that's the document in the books and records.

THE COURT: So you tell me then when the Pledge Agreement talks about registration what was involved. What had

to happen in order for -- in your view -- you can sit down. I just want to understand. What had to happen in your view for, I'll call it the movants, to become the one hundred percent owners of the membership interest in Riverair?

MR. BERNARD: They had a call meeting. They had to --

THE COURT: Why did they have to do that?

MR. BERNARD: Well, they had to go through exactly what they went through here is file with the Secretary of State of Delaware removing the member and putting themselves --

THE COURT: Why did they have to do that?

MR. BERNARD: Because that is what the agreement calls for.

THE COURT: What agreement calls for that?

MR. DREBSKY: Your Honor, specifically the Pledge Agreement talks about registration of the pledged shares in the pledgor or pledgee's name.

THE COURT: But when I read your response -- as I understand your response you said that the movants never became the owners because the debtors didn't register them as the owners.

MR. BERNARD: Correct, Your Honor, and our position would be that the amended and restated operating agreement contains that registration.

THE COURT: So it was up to the debtors to do it?

MR. BERNARD: Well, voluntarily if the debtors consented and complied.

THE COURT: But weren't you contractually obligated to do it?

MR. BERNARD: And if we didn't do it, Your Honor, they could have an action against Holding if they're injured, but we didn't do it.

THE COURT: This is a court of equity. You're telling me that they didn't become the owners because you didn't do what you were contractually obligated to do.

MR. BERNARD: But, Your Honor, we did contest that -- their legal right to ask us to do that.

THE COURT: But I hadn't seen -- in their answering papers I hadn't seen any defense or contest to the underlying claim one, that there was a default, and two, that they really did everything that they had to do under the Pledge Agreement to become the owners.

MR. BERNARD: Well, Your Honor, they didn't do everything they had to do.

THE COURT: What did they have to do?

MR. BERNARD: They had to vote -- well, they had to do two things. They had to get the name registered.

THE COURT: But that was something you had to do.

MR. BERNARD: Well, and if we refused to do it then they could take a vote and claim that they're members and --

THE COURT: So tell me what rights you had not to do it. That's all.

MR. DREBSKY: Well, Your Honor, we refuted or disputed their request in our answer -- in answering their complaint to compel us to do that.

THE COURT: But I thought that the -- there's no dispute that the debtor -- whoever was liable for the note was in default; right?

MR. DREBSKY: Well, there's no dispute that they are -- that money was lent, but there are significant in answering -- I think what you had here is --

THE COURT: Just show me where that is in your papers.

MR. DREBSKY: It's in the answer in the -- actually, it's in their papers because they filed the answer. See, they brought a declaratory judgment action in state court.

THE COURT: Well, yes, they had to bring actions because you wouldn't do what they say you were supposed to do.

MR. DREBSKY: We responded.

THE COURT: I have your papers here. Just tell me what the defense is to their claim that they own the membership interest other than that you didn't register it.

MR. BERNARD: Your Honor, bottom line is that at the end of -- well, even still regardless, the operating agreement vests the managing powers into Holding.

THE COURT: I understand that.

MR. BERNARD: As a managing member it has authority to commence a bankruptcy case. So even if --

THE COURT: But they're saying -- don't you have to own the membership interest to be a managing member? You're insider managers; right?

MR. BERNARD: No, I don't believe the LLC statutes require -- I'm not exactly sure that that's true under the LLC statute.

THE COURT: So you're saying that as a non-member you have the authority to do this, vested in you in a LLC?

MR. DREBSKY: We were still the members. They didn't remove us as members. We contested their right. In fact, if you look at the underlying case law, Your Honor, what happened in case after case when that happened, and it's the cases that they've -- you go to court, you seek either a TRO --

THE COURT: But that's a procedural -- that's a procedural step and every one of these agreements is different. I'm still trying to understand why you say that we're entitled to it other than that you didn't register them.

MR. DREBSKY: Well, there was -- in answer to their complaint there were six affirmative defenses.

THE COURT: I'm looking at the motion papers. They make a motion. I look at the response and I try to figure out what the issues are and resolve them. I'm looking at your

motion papers and all I seem to -- all I see is that you say well, the debtors didn't register them so therefore they're not owners.

MR. DREBSKY: Well, we don't believe all -- we don't believe underlying that they're entitled. We believe that there's been misconduct. In fact, we've asked for 2004 --

THE COURT: Where is that?

MR. DREBSKY: That's an answer to their underlying complaint in the declaratory judgment --

THE COURT: But the only thing you put in your response is that they're not members because we didn't register them.

MR. DREBSKY: No. That is not -- we said they had to go to court and seek their rights. They didn't --

THE COURT: That I understand. You're saying that procedurally when you don't register them as they claim you're required to do under the agreement they have to go to court to effectuate that and that's your argument.

MR. BERNARD: Yes.

THE COURT: I got it.

MR. BERNARD: Second --

THE COURT: You're getting double -- you have three lawyers. So --

MR. BERNARD: Secondly, the next step involved in that would be to remove Holding as the managing member because

now if they're recognized as the equity interest holders they could arguably replace Holding as a managing member which is set up through the operating agreement which governs here which has never been changed all through --

THE COURT: But I notice the bankruptcy purported to be authorized by a vote of the members --

MR. BERNARD: There is only one member.

THE COURT: Right. Didn't they have the voting rights as a result of the default?

MR. BERNARD: Your Honor, I believe that under the LLC statute and under the amended operating agreement, Holding actually as the managing member of Riverair has the ability and the authority to put Riverair into bankruptcy. There's no specific requirement in the LLC statute that members vote on whether the LLC goes into bankruptcy. The authority --

THE COURT: You're saying you had the right to manage this LLC even though you had no interest in it?

MR. BERNARD: Well, until the -- this is the secondary argument, Your Honor. Obviously our first position is that the --

THE COURT: I didn't see it in your papers.

MR. BERNARD: But the argument, the position is that -- well, we are still a member, but even if we're not we are the managing member of Holding pursuant to the operating agreement which was never changed, never altered, and as the

managing member have a fiduciary duty to the company.

THE COURT: If you had complied with the request or the demand they made on October 28th and done everything that they asked you to do in that letter, would you still be the managing agent with the authority to put the company in bankruptcy?

MR. BERNARD: Your Honor, I don't believe they did anything to change the fact that we are the -- that Holding is the managing member of Riverair. None of their letters as to replace Holding or say that they acting as members want to change the management of the company. They haven't done anything like that. They never requested anything along those lines.

THE COURT: But you recognize that prior to filing there was a vote of the membership interest. So at least implicitly you recognize that you had to vote to put the company in bankruptcy and if you weren't the member and they were the member, how did you conduct that vote?

MR. BERNARD: Well, Your Honor, because we disputed their request to change -- to transfer the pledged shares we believe we were still the member and could conduct a vote. Holding conducted its own vote and also authorized the filing for Holding as well as the Riverair, Riverair II in which it was the managing member.

MR. MOLDOVAN: It's difficult to determine where to

begin. What you're hearing is --

THE COURT: How about the beginning?

MR. MOLDOVAN: The beginning is a lot of nonsense. They signed a Pledge Agreement. The Pledge Agreement says they default, we become the voting member. We succeed to all voting rights. It just happens. What they're saying to Your Honor is no, it has to be a please, sir, may I exercise and I should go to one of your -- in some other court and say oh, ignore what we agreed to in our Pledge Agreement and give me declaratory relief. Where is that written? It's not written in any statute. It's not written in any document and it's nothing that has been expressed by the legislature of the State of New York. So where does this come from?

Well, we have our Pledge Agreements, contracts that commercial parties enter into. This is not a -- your decision here, Your Honor, is not limited to this little dippy single asset bankruptcy case which involves at this moment in time nothing but air.

THE COURT: Literally, right?

MR. MOLDOVAN: Literally air. We're talking about the air above a synagogue on 91st Street. There's no building except the synagogue --

THE COURT: It must be holy air.

MR. MOLDOVAN: -- which has always been there. It's holy air.

THE COURT: It's also above a funeral parlor though also, isn't it?

MR. MOLDOVAN: So we had this air. That's what this is about. There's no building. There are no hard assets.

THE COURT: Well, it must be valuable because you guys are sure fighting hard for it.

MR. MOLDOVAN: It is. That's an interesting thing, Your Honor. It is valuable and the folks on this side of the table have done nothing, zippo, nada with this property.

THE COURT: That's really not the issue though.

MR. MOLDOVAN: You're right which is why we left it for the very end of our papers. The issue is what is Your Honor going to do with respect to a legitimately entered into Pledge Agreement by commercial parties which provides explicitly upon the event of default. Did they pay the loan? No. Did it mature? Yes. Is it in default? No one can deny that. Upon the event of default pledgee shall have the right to succeed, designate one or more nominees to all title and interest of pledgor including without limitation the right, if any, to exercise all voting rights, to take any action as the sole member. This is not part. They just don't want this to happen.

But Your Honor is faced with -- as I've said, this is not -- although it's a little dippy case, if Your Honor determines that we had to go to state court to enforce these

rights, Your Honor will be doing something no state court in New York has said we have to do. The New York State legislature hasn't said we have to do, and when I walked around my law firm and spoke to my --

THE COURT: And you asked them because --

MR. MOLDOVAN: I spoke to my commercial partners, my corporate partners, the financier guys.

THE COURT: This is very compelling authority you're about to give.

MR. MOLDOVAN: I said what would happen if this were the case and they said it can't possibly be the case.

THE COURT: Western civilization would come to an end as we know it.

MR. MOLDOVAN: Western civilization reform. I said this is just --

THE COURT: What's your next point?

MR. MOLDOVAN: That is the point, Your Honor. Everything else is in our papers.

THE COURT: Thank you. Anything else? I'll give you the last word. I'm sorry. Who are you? Who do you represent?

MR. RUBIN: Your Honor, Paul Rubin from Herrick Feinstein. I'm representing Amsterdam 91st Street Associates which is the largest creditor holding the mortgage on the property. I just wanted to make two points briefly, Your Honor.

One is in terms of context. There was a new event that happened since this motion was filed. The debtor just about two weeks ago filed its schedules, all three debtors did. So have although a motion to dismiss only one case, I would like to mention with regard to the other two Riverair II has only one creditor where --

THE COURT: I understand. I have another case. Let's just get back focused to what we're here for today.

MR. RUBIN: With regard to the motion, putting aside the motion to dismiss we think there is on those cases, it seems to us that -- the debtor is saying that Your Honor -- they should form for a declaratory judgment. That declaratory judgment would have said back in October the debtor didn't have the right and we don't think the debtor -- the Judge today -- the Court should be an agnostic on that issue. If it comes to the point that --

THE COURT: Certainly not with their rights over a synagogue.

MR. RUBIN: That's right, but we agree with what Mr. Moldovan says in terms of the fact that if the Court determines today that there was no valid basis to refuse to do so then as a court of equity it should not take jurisdiction over a case because a party violated rights it was suppose to honor. Thank you, Your Honor.

THE COURT: Thirty seconds, Mr. Drebsky.

MR. DREBSKY: One, I just -- in the case the Court is unaware, we have filed a plan to pay everybody off. I think the Court should be aware of that.

THE COURT: Well, if you didn't have the authority to file a case the plan is not a very good argument.

MR. DREBSKY: We had promised that we would file a plan expeditiously and we --

MR. MOLDOVAN: It's also a facially unconfirmable plan.

THE COURT: Please. The question is whether on day one they had the authority to do it.

MR. DREBSKY: Well, you look at the very cases that were cited here. When there is a dispute as to -- you go to court, you get a TRO. That's what happened in the cases, even in the Bancorp. case that's what happened, the case that's relied upon. You go to court. There's a legitimate dispute.

THE COURT: But you know they didn't have to do that because you came to this Court.

MR. DREBSKY: Well, we -- we came to this Court to protect an asset. They could have gone and gotten a TRO or anything else and then we would be in a different posture here, Your Honor.

THE COURT: Okay.

MR. DREBSKY: Everything else is in the papers.

THE COURT: Do you want a last word now?

MR. BERNARD: Your Honor, I know Neustar Sandor's counsel harped on and this Court acknowledges this is a court of equity. Our plan is confirmable but not getting into that, we do have a signed letter of intent.

THE COURT: Right.

MR. BERNARD: That letter of intent gets us easily sufficient funds to satisfy Neustar Sandor in full with interest unimpaired and they're sitting in first position. So this is not about --

THE COURT: Do you want to withdraw your motion?

MR. BERNARD: Absolutely not.

THE COURT: So that settles that.

MR. BERNARD: Bottom line, this is a case where the secured creditor wants the asset. Obviously the asset has --

THE COURT: They're not the secured creditor. They say they're the owner. Sit down.

On November 29, 2004, Riverair, LLC, hereinafter Riverair, its parent, Riverair Holding, LLC, hereinafter Holding, and an affiliate Riverair II, LLC filed Chapter 11 petitions. On December 23, 2004, Neustar Realty, LLC and Sandor Development, LLC, collectively the movants, filed this motion to dismiss Riverair's bankruptcy case based on the lack of authority to file the petition. For the reasons that follow the motion is granted.

The movants created Riverair, a New York limited

liability company, in 2000 to develop a 108,000 square foot 45 unit luxury residential condominium building at 210 West 91st Street in New York. The project was to utilize air rights subsequently acquired from adjacent properties in the summer of 2001. Riverair owns the air rights and Riverair II owns certain tax certificates relating to the project.

On or about June 6, 2001, the movant sold one hundred percent of the membership interests in Riverair to Holding. Holding executed a promissory note for approximately $1.6 million in favor of the movants secured by Holding's pledge of the Riverair membership interests. The pledge is governed by a Pledge Agreement dated July 16, 2001. Under Paragraph 6A, Holding assigned its voting rights in Riverair to the movants but under Paragraph 6B Holding continued to exercise those voting rights until an event of default occurred. At that point, the movants acceded those rights.

The Pledge Agreement granted other important rights to the movants in the event of a default. Under Paragraph 7A, the movants would require that the membership interests in Riverair be registered in their name. Thereafter, the movants could exercise all of the voting and other rights emanating from the membership interests as if they were the owners of those interests.

Under Paragraph 8B1, the movants, upon giving written notice to Holding, succeeded to all of Holding's right, title

and interest as sole member of Riverair, including the right to exercise all voting rights or to take any action with respect to company matters. Under Paragraph 8B1, Holding irrevocably directed Riverair upon the receipt of such notice to 1) treat the movants as the sole member of Riverair; and 2) "file amended articles of organization admitting [the movants] ... as a member in place of [Holding]".

Finally, under Paragraph 11, Holding agreed to deliver any documents reasonably requested by the movants necessary to obtain and preserve the benefits of the Pledge Agreement. Riverair did not sign the Pledge Agreement but executed an acknowledgment and consent of the Pledge Agreement dated July 16, 2001. Riverair acknowledged that it had registered the pledge of the membership interest on its books and records. It recognized the movant's rights under the Pledge Agreement. Lastly, it agreed to cooperate with the movants with respect to those rights.

It is undisputed that the note has not been paid when due and an event of default occurred and continued. Following the default, the movants exercised their rights under the note and Pledge Agreement. By letter dated October 28, 2004, they advised Holding, Riverair and Phoenix IV, the owner of Holding, that an event of default had occurred and that the movants were exercising their rights under the Pledge Agreement, including those pertaining to ownership and voting.

That same day they commenced actions in the Supreme Court of the State of New York, New York County for summary judgment in lieu of complaint to collect on the note and for declaratory relief seeking to enforce their contractual rights to control Riverair. No judgments or orders were entered prior to the bankruptcy filings which stayed the continuation of a lawsuit.

By letter dated October 28, 2004, the movant's office sought to exercise their rights under the Pledge Agreement to strictly foreclose on the pledge membership interests of Riverair in full satisfaction of the amounts due under the note.

Finally, on November 2, 2004, the movants sent a letter to Persi R. Pine, the individual purporting to be in control of Holding and Riverair seeking assurances that Holding would abide by its obligations under the Pledge Agreement and allow the movants to control Riverair. No response was received.

On November 29, 2004, the debtors filed the Chapter 11 petitions. The Riverair filing was purportedly authorized by its alleged sole member, Holding. The person filing a Chapter 11 petition on behalf of the corporation must be authorized to do so under state law. See Price v. Gurney, 324 U.S. 100, 106 (1945). If the Bankruptcy Court "finds that those who purport act on behalf of the corporation have not

been granted authority by state law to institute the proceedings it has no alternative but to dismiss the petition." Id. In the case of a New York limited liability company, unless the articles of organization provide otherwise, management of the company and consequently the authority to place the company into bankruptcy is vested in a company's members. See New York Limited Liability Corporation Law, Section 401 (McKinney 2005).

The only issue in this case is who as between the movants or Holding was the sole member of Riverair at the time of bankruptcy. If as the movants contend they held that interest, the Riverair petition was unauthorized. The debtors do not dispute that a default occurred and continues under the note and Pledge Agreement. Given the undisputed default, the Pledge Agreement grants the movants the option to cause the membership interests of Riverair to be registered in their name and upon written notice Riverair is directed by Holding to treat the movants as its sole member. In addition, Riverair separately agreed to cooperate with the movants to exercise their rights.

The movants exercised their option through their letter dated October 28, 2004. The movants sent two additional letters to Holding and Riverair reiterating the demands made in the October 28 letter and specifying that the movants had become the sole members of Riverair and a bankruptcy filing by

Riverair without the consent of the movants was unauthorized.

Therefore, under the plain terms of the Pledge Agreement, the membership interests of Riverair were required to be registered in the name of the movants and the movants succeeded to all the rights of Holding as sole member of Riverair. The debtor's papers filed in this motion do not dispute movant's rights under the Pledge Agreement. Instead, they argue that "[t]he debtors did not consent or comply with [the movants] demand letters including ... the new registration of the Riverair membership interest demanded in the October 28 letter." (See debtor's response at Paragraph 25.)

Without such consent, the debtors contend, the movants were "required to obtain relief from a court of competent jurisdiction recognizing [the movants] right to vote the Riverair membership interest." Id. at Paragraph 32. The debtors note that the movants sought such relief through their state court actions but did not obtain interim or final relief. The debtor's argument is plainly flawed as it seeks to capitalize on their own breach of duty. The Bankruptcy Court is a court of equity and "equity regards as done that which ought to be done." Both Holdings and Riverair contractually agreed to recognize the movant's rights and cooperate with the movants to insure that those rights could be enforced. The argument that the movants must lose because Holdings or Riverair or both failed to register the change in membership as

they agreed to do rings hallow. The membership interest should have been registered in the movant's name and this Court as a court of equity will deem this to have been done.

In addition, the debtor's position also ignores the adoption of prevention under contract law. A party to a contract that prevents a condition to his performance cannot insist that the condition must occur before he becomes obligated to perform. In re: Trace International Holdings, 284 B.R. 32 at Page 36 (Bankruptcy Southern District of New York 2002).

A corollary principle holds that every contract includes an implied undertaking by each party that it will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on its part. Id. Riverair and Holding failed to re-register the membership interests and they cannot now insist that they don't have to recognize the movants because of that failure. That the movants purports to sue in state court to enforce their rights under the Pledge Agreement hardly improves the debtor's argument. This action was necessitated by the debtor's refusal to comply with those rights in the first place. To insist that the movants must obtain a court order rewards the debtors for their own breach.

I note in this regard that Keenihan v. Heritage Press, Inc., 19 F.3d 1255 (8th Cir. 1994), does not require a

court order to effectuate the transfer of membership interest. There, the pledgee sued prior to bankruptcy and obtained injunctive relief recognizing his rights as a stockholder. The Court dismissed the bankruptcy petition filed by the pledgor relying on the state court disposition. However, the Court ruled in the alternative and without regard to the state court injunctive relief that the pledgee was entitled to vote the shares as a result of the default on the note and the provisions of the Pledge Agreement. Id. at 1258.

Furthermore, unlike the pledgor in Keenihan, Holding and Riverair were obligated to perform certain affirmative duties, including the duty to treat the movants as the sole member of Riverair and to cooperate with the movants in the exercise of their rights under the Pledge Agreement. Thus, the parties agreements in this case clearly spell out their rights. In any event, Keenihan is not binding on this Court.

The debtors make the additional argument that the movants did not foreclose on the membership interests. However, the expressed terms of the Pledge Agreement entitled to the movants to become the absolute owner of Riverair without the need to foreclose and hence foreclosure was unnecessary. See In re: Domestic Fuel Corp., 71 B.R. 734, 738 (Bankruptcy SDNY 1987) (dicta). Accordingly, the Court does not have to pass on whether a foreclosure occurred.

In conclusion, Holdings lack the authority to

authorize the Riverair filing or to sign the petition. As a result, the Chapter 11 petition of Riverair is dismissed.

Do you have an order?

MR. DAL LAGO: We do, Your Honor.

THE COURT: Hand it up, please. Have you seen the order?

MR. BERNARD: No.

THE COURT: Why don't you take a look at the order?

[Pause in proceedings.]

MR. DAL LAGO: Your Honor, in light of Your Honor's ruling in this one case, would Your Honor require a separate motion with regard to the other two?

THE COURT: Yes, I can't dismiss a case without a motion. It's got to be on notice to creditors and the U.S. Trustee and other parties in interest.

MR. BERNARD: May I approach, Your Honor?

THE COURT: Do you have a disk?

MR. BERNARD: Yes, Your Honor.

[Pause in proceedings.]

THE COURT: I struck the first decretal paragraph. I'm signing the order.

Where does that leave the 2004 application? Is that academic?

MR. BERNARD: I don't think -- well, Your Honor --

THE COURT: I started to look at it and then I

wondered whether it was necessary to do that.

MR. BERNARD: I don't know. I don't think -- I think if -- well, we could either withdraw it or --

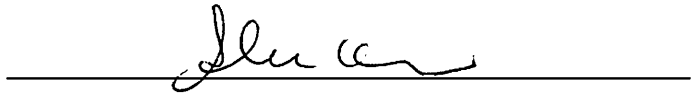
THE COURT: Why don't you withdraw it without prejudice because you're going to have to redo it if you still think you're entitled to 304 relief. It sounds like you're going to get a motion in both cases, one case, and unless the discovery bears on the motion and, in fact, if you get the motion you can take the discovery without a 2004 order. Maybe you can deal with it that way.

MR. BERNARD: We'll withdraw it without prejudice.

THE COURT: We'll mark it withdrawn.

* * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.



Shari Riemer

Dated: 2/4/05